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IN THE

United States Supreme Court

OCTOBER TERM, 1959

No. 185

NATIONAL CANCER HOSPITAL OF AMERICA,

Petitioner,

against.

BETHUEL M. WEBSTER, as Receiver, and THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT ADAMS,
Attorney for Petitioner,
No. 10 East 40th Street,
New York 16, N. Y.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, NATIONAL CANCER HOSPITAL OF AMERICA, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Second Circuit, which granted a motion by the Receiver to dismiss the appeal to that Court as frivolous.

OPINIONS BELOW

The opinion of District Judge Noonan is printed in Appendix A. The Circuit Court simply wrote: "Motion to dismiss granted."

JURISDICTION

The order of the Court of Appeals for the Second Circuit was dated and entered May 7, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (No. 1). The petitioner urged the due process and equal protection clauses of the United States Constitution in all the State and Federal Courts.

STATEMENT OF FACTS

In November, 1950, the People of the State of New York commenced an action against the petitioner here. The sole measure of relief sought initially was an injunction restraining the petitioner from pursuing fund-raising activities in New York State. With respect to the petitioner (hereinafter called National), it was alleged that it had been incorporated under the laws of the State of Michigan and had failed to secure a certificate of authority to do business in New York.

The complaint did not discuss money. That is to say, it was not contended that the People were entitled to seize National's funds or that there had been a forfeiture for any reason justifying the appointment of a receiver.

During the period of almost three years that intervened between the commencement of the action by the People and the trial before Mr. Justice Levey, no motion was made to amend. The trial began in June, 1953, and after the People had rested, for the first time a motion was made for a dual purpose: first, to secure the appointment of a receiver of National's assets and, secondly, to distribute

National's money in New York State in accordance with the *cy pres* doctrine. The Court reserved decision. Both sides moved for the direction of a verdict. The Court granted the motion of the People for an injunction and ordered that a receiver be appointed. At no time was any determination made of the People's motion as to which decision had been reserved.

The complaint by the People contained several causes of action. The first was captioned: "For a First Cause of Action against Defendant National Cancer Hospital of America". Paragraph "Thirteenth" of that first cause read:

> "That the defendant National Cancer Hospital of America has not and never has had a certificate of authority to do business within the State of New York."

In the first cause of action there were no allegations of fraud. The People contented themselves with a recitation of such facts as were deemed sufficient to justify an injunction upon the sole ground that a foreign corporation was doing business in this State without authority.

As appears from the opinion of Mr. Justice Levey, he granted the People's motion for the direction of a verdict only because National was transacting business in New York without warrant. That the Court disregarded all of the other causes of action in the complaint is plain from the following conclusion:

> "Accordingly, the motion for a direction in favor of the plaintiff in connection with the first cause of action is granted, and the jury is so directed."

The Court ordered the settlement of a judgment providing for the appointment of a receiver. Nowhere in the opinion was National found guilty of fraud or misconduct.

With respect to the matter of *cy pres*, it is clear that the Court disclaimed any intention of invoking that principle. Thus:

> "Mr. Ramey: Now, your Honor, let me say something else. There is something else I must say. This matter, I think, if your Honor is going to apply the *cy pres* doctrine here—
>
> The Court: I didn't say I am applying the *cy pres* doctrine; I didn't say anything of that kind.
>
> Mr. Ramey: Well, what is the purpose of a receiver, your Honor? This money belongs to these people.
>
> The Court: Let the receiver go into this thing very thoroughly. Let him find out where the differences occur and let him tell the Court and report to the Court something that you folks can't explain to me—namely, where in your case is $165,000, and in your case $185,000. Explain to the Court just how this thing operated, how the moneys were collected, who got the moneys and why they got the moneys. That is what I want to know."

Mr. Justice Levey made it plain that he was reaching no official conclusion about culpability. He wished the receiver to make a penetrating investigation of the facts and report to him. Indeed, he solicited the cooperation of National. Consider the following excerpts from the record in chief:

> "The Court: Mr. Ramey, I am not accusing anybody here. I am simply taking the facts as they were

adduced during this trial. I think they warrant an investigation and a very thorough investigation; as I stated, an exhaustive investigation, and I think both of you gentlemen should cooperate with whoever is designated to get to the bottom of this thing.

• • •

The Court: Let the receiver report to me and on the basis of his findings I will determine what to do. I will determine what to do.

• • •

The Court: Let us find out. I think this is one case that deserves a very, very intensive investigation."

Since the Court had concluded that the People were entitled to an injunction because National was doing business in this State without authority, he deemed it unnecessary to pursue the case further. This is manifest from his final remarks to the jury:

"The Court: Gentlemen of the jury, your function as jurors is to decide on the facts. If there are any legal questions, questions of law, those become the Court's duty. Certain matters have come up in connection with this case, and it developed that there were only legal questions to be decided; and on motions by both sides it was left to the Court to decide those questions, which it has done. Accordingly, there isn't anything left for you to decide."

The judgment contained the following provisions:

"ORDERED, ADJUDGED AND DECREED that Bethuel M. Webster, Esq., of 15 Broad Street, New York City, be and he hereby is appointed Receiver without compensation for services of all the assets and property

of National Cancer Hospital of America, located within the State of New York, first, to conserve whatever assets he may put his hands upon; and second, to make exhaustive investigation of the entire situation taking whatever steps and action he deems necessary to recover any moneys and to effectuate his duties within the powers conferred by law on permanent receivers.

* * *

ORDERED, ADJUDGED AND DECREED that all funds of the defendant, National Cancer Hospital of America, remaining in the receiver's hands after payment of all indebtedness and the expenses of administration shall be distributed *cy pres* to cancer organizations upon application by the Receiver to this Court for approval of any such recommended distribution, * * *"

National appealed. At first the judgment was affirmed in all respects (284 App. Div. 935). Upon reargument there was a modification (285 App. Div. 871) as follows:

"THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT v. NATIONAL CANCER HOSPITAL OF AMERICA *et al.*, Appellants, *et al.*, Defendants.—Motion for reargument granted and upon reargument, the decision herein is recalled and, upon such recall, the decision is modified to the extent of striking from the judgment the decretal paragraph directing the distribution *cy pres* of all funds remaining in the receiver's hands after payment of all indebtedness and expenses of administration. This direction, aside from its vagueness, was made prematurely. An application for specific *cy pres* distribution in accordance with the applicable provisions of subdivisions 2 and 4 of section 12 of the Personal Property Law,

may be made at the appropriate time. In all other respects, including its branch seeking leave to appeal to the Court of Appeals, motion is denied. Settle order."

The judgment, as modified, was affirmed without opinion (1 N. Y. 2d 802).

The Receiver moved before Mr. Justice Levey for distribution *cy pres* of the sum of $55,000.00 to various charitable institutions listed in an exhibit attached. Reliance was placed upon §12 of the Personal Property Law. The petition was that of the Receiver alone and not of the People. In its answer to that petition the petitioner here asserted a variety of defenses and a counterclaim. The Constitutional questions of due process and equal protection were expressly presented. But there was no genuine hearing. The Receiver himself did not appear in Court. No witnesses were placed upon the stand and no documents offered in evidence. Even a desultory reading of the "Minutes" reveals that all that occurred was an exchange of views by counsel. The attorney for National over and over again demanded a "trial" and discussed the "absence of proof" and indicated the "nature of the proposed testimony".

For illustration, counsel for National argued:

> "• • • I believe that a trial is necessary unless all of the issues are eliminated. (246)
>
> • • •
>
> I am also going to ask your Honor to please direct the receiver and or the attorney general, as the case may be, to reply to the answer which has been interposed so that we may narrow the issues

> and know what facts the receiver admits and what facts he denies." (248)

Although the alleged "hearing" took place on October 30, 1956, it was not until November 8, 1956, that a reply to National's answer was served and filed. Therein the Receiver alleged:

> "In June, 1953, trial was had and the allegations of the complaint were proven."

Mr. Justice Levey signed the resettled order permitting distribution *cy pres*. That order was dated February 13, 1957. The order was based, in part, upon "the statements of counsel of the respective parties on the hearing of this application."

Mr. Justice Levey made no findings. At no time did he refer to the Constitutional questions.

At this stage National believed that it was imperative to seek the assistance of the Federal Court to prevent distribution by the Receiver. The result was the opinion of Judge Dawson (153 F. Sup. 744), followed by the affirmance in the Circuit Court of Appeals (251 F. 2d 466). As we read the opinions they simply announced the principle of non-intervention by the Federal judiciary in proceedings in a State Court.

The petitioner was thus relegated to the appeal from the resettled order of Mr. Justice Levey. National proceeded with that appeal and the consequence was an affirmance by the Appellate Division (6 App. Div. 2d 61).

Application was made for leave to appeal to the Court of Appeals and denied. (6 App. Div. 2d 1004; 5 N. Y. 2d 709). Conceiving that it had exhausted all of its remedies

in the State Courts National instituted an action in the United States District Court for the Southern District of New York.

Judge Noonan granted the Receiver's motion to dismiss. National appealed. While the record was in the course of preparation the Receiver moved to dismiss the appeal as frivolous and that motion was granted.

REASONS FOR GRANTING THE WRIT

1. Petitioner's grievance.

In essence it is this:

National undeviatingly presented the Constitutional questions of due process and equal protection. It has never been heard. A lower State Court declined to hear without reason. A higher State Court mistakenly assumed that National had been heard. (When and where is a mystery. As in Kafka's "Trial" neither Court nor opposition will elucidate.) The Federal Courts originally declined jurisdiction because proceedings were still pending in the State Courts. National was remitted to the State with the implied assurance of a fair consideration of the Constitutional arguments. After National had exhausted its remedies in the State Courts and returned to the Federal tribunal, the posture of its case was this: It reminded the Federal Court that remand to the State had been predicated upon the assumption that the State Courts would listen and decide. Instead of a hearing there was an evasion and a refusal to listen. Thus, there was no bar to the power of the Federal Court to entertain those Constitutional questions that the State Courts had ignored. But up to now the Federal Courts have declined relief.

2. The matter involved is of great public importance. National has exhausted its remedies in the State Courts. It asserted the constitutional questions of due process and equal protection seasonably but without avail. It was denied the opportunity to be heard upon those questions. Accordingly, resort to the Federal Court was proper.

We begin our voyage of exploration with the opinion of the Appellate Division affirming the resettled order of Mr. Justice Levey. That Court wrote, in part, as follows:

> "On the application, from which the present appeal stems, appellants were provided the opportunity to be heard on the narrow issue involved. They were not, as noted before, entitled to retry any portion of the case previously determined and carried into the judgment, which, as modified, and thereafter affirmed, is the law of the case."

Certainly, copious citation of authority is not requisite to establish the principle that only that is *res judicata* and only that is the law of the case which either was heard or could have been. If the Constitutional questions to which we have referred were actually heard at the original trial before Mr. Justice Levey or could have been heard, of course, the Appellate Division was right. If, on the contrary, such questions were not in fact heard and could not legally have been heard, then we see no escape from the contrary result. It is admitted that in the original complaint no reference was made to money or to the appointment of a receiver or to *cy pres*. During the three years antecedent to the trial the complaint was never amended. For the first time, at the close of the People's case, the application for a receivership was made and the *cy pres* doctrine invoked. Permit us to pause at this stage for a

brief commentary. The Court, of course, is aware of comparable situations. Take, for example, a case where in the course of trial the plaintiff asserts a new claim or amplifies an existing one. A trial Judge, in the modern spirit of liberality, may grant the amendment but, at the same time, will allow the defendant to amend its answer to plead, let us say, the statute of limitations. This is regarded as elemental fairness.

But what does a defendant do when a plaintiff moves to amend, the defendants objects, and the Court reserves decision? That is what happened here. Mr. Justice Levey reserved decision on the People's motion to amend the complaint by asking for the appointment of a receiver and distribution of moneys *cy pres*. Curiously enough, the trial Justice never passed upon the motion. It was neither granted nor denied. In that posture when does the Receiver say the defendant should have moved to amend the answer to interpose Constitutional claims?

Parties and their lawyers are not clairvoyant. Suppose Mr. Justice Levey had elected to deny the People's motion to amend the complaint for any one of a number of reasons. In that case an amendment of the answer would have become unnecessary. If, at any point, the Court had announced that it was granting the motion National would have had the right to amend the answer or at least make an application for leave to amend and, if denied, note an exception that would have provided the basis for an appeal.

In his opinion Mr. Justice Levey directed a verdict only upon the first cause of action, that cause which sought an injunction because National was allegedly doing business in New York State without authority. The record recites this: "Accordingly, the motion for a direction in favor

of the plaintiff in connection with the first cause of action is granted, and the jury is so directed."

With respect to any other cause of action in the complaint the Court said:

> "I believe that equity decrees that a receiver be appointed whose function it will be, first, to conserve whatever assets he may put his hands upon; and second, to make an exhaustive investigation of the entire situation, * * *."

Thus, at the end of the case, for the very first time the Court announced that he was appointing a receiver and even then did not pass upon the motion for leave to amend the complaint.

True, implicit in the appointment of the receiver is a granting of such motion. But then it was too late for the defendant to apply to amend its answer because judgment had already been directed. The case was over. The answer was merged in the judgment and there was nothing to amend.

But, it may be asked, was it not clear that the very reason for the appointment of the receiver was to seize National's property and to distribute it *cy pres* as the People requested. But how does that square with the succeeding portion of the record reading:

> "Mr. Ramey: Now, your Honor, let me say something else. There is something else I must say. This matter, I think, if your Honor is going to apply the *cy pres* doctrine here—
>
> The Court: *I didn't say I am applying the cy pres doctrine; I didn't say anything of that kind.*"

As appears from the statement of facts Mr. Justice Levey had planned to hold a final determination in abeyance until the Receiver reported the results of his "exhaustive investigation". It was then, said the Court, that "I will determine what to do."

But the Receiver has never reported. So far as we know the Receiver has never made an exhaustive investigation or any investigation and has not served or filed a report. It follows that the time has not yet arrived for Mr. Justice Levey to "determine what to do."

What then did the Appellate Division mean when it said that there was no point in retrying the issues since they had been tried once before Mr. Justice Levey? What issues?" Certainly not the Constitutional issues of due process and equal protection. They were not before Mr. Justice Levey.

If we are correct thus far, and we have been relying upon and quoting only the record, then it must follow that the Constitutional questions were not heard and could not have been heard at the original trial before Mr. Justice Levey. Since they were adequately and fully raised in the answer to the Receiver's petition for leave to distribute why was not National entitled to be heard then!

Thus, National has been placed in a most invidious position. It was prevented from raising the Constitutional questions in the original answer because the People never made a claim to National's money and never sought a receiver or *cy pres*. It was the People who were dilatory. Not only that, there was an interval of three years prior to trial and still there was no amendment to the People's

complaint. It was impossible for National to raise the Constitutional questions at the trial. Upon the first appeal to the Appellate Division, it will be remembered, reargument resulted in the deletion of the paragraph dealing with *cy pres.* The Court of Appeals obviously could not pass upon *cy pres* because it had been struck from the judgment.

It seems clear that National raised the issues of due process and equal protection at the earliest possible moment; that it demanded a hearing; that a hearing was denied; that the Federal Courts requested National to exhaust its remedies in the State Courts; that National followed the suggestion and proceeded with appeals; that the sole result was that National was informed that it could not "retry the issues."

The State Courts may not evade their obligation to pass upon Constitutional questions. If they do an aggrieved suitor may apply to the Federal Courts.

In *Davis* v. *Wechsler,* 263 U. S. 22, the Court wrote at page 24:

> "• • • Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. • • •"

And in *Postal Telegraph-Cable Company* v. *City of Newport,* 247 U. S. 464, this was written at page 476:

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be effected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a

former action in a court of competent jurisdiction. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; Greenl. Ev. Sections 522, 523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. ed. 914, 915; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; Simon v. Craft, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836. • • •"

And in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, this was written at page 282:

"But the constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. See Ward v. Love County, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 S. Ct. 419; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 164, 61 L. ed. 644, 648, 37 S. Ct. 318; Fox River Paper Co. v. Railroad Commission, 274 U. S. 651, 655, 71 L. ed. 1279, 1283, 47 S. Ct. 669. • • •"

And in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, the Court wrote at page 678:

"• • • The additional federal claim thus made was timely, since it was raised at the first opportunity. Missouri ex rel. Missouri Ins. Co. v. Gehner, 281

U. S. 313, ante, 870, 50 Sup. Ct. Rep. 326. The petition was denied without opinion. This court granted Certiorari. 280 U. S. 550, ante, 608, 50 Sup. Ct. Rep., 152. We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the Federal Constitution to equality of treatment. Green v. Louisville & Interurban R. Co. 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 672, Ann. Cas. 1917E, 88; Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 67 L. ed. 340, 28 A. L. R. 979, 43 Sup. Ct. Rep. 190. If the allegations of the complaint could be established, the Federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. • • •

• • •

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied its relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement

of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

* * * *

* * * The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

See, also:

Brown v. *Western Railway*, 338 U. S. 294, 6, 9;
Rogers v. *Alabama*, 192 U. S. 226, 230;
Enterprise v. *Farmers*, 243 U. S. 157, 164;
New York Central v. *New York & Penn.*, 271 U. S. 124, 6.

To recapitulate:

1. Was National given the opportunity to raise Constitutional questions at the first trial?

2. If, not, were those questions seasonably raised upon the Receiver's application to distribute moneys *cy pres*?

3. Was National heard on the questions?

4. Has National exhausted its remedies in the State Courts?

If, after consideration of the foregoing, this Court reaches the conclusion that National asserted the Constitutional questions at the first opportunity and was never afforded the opportunity to be heard on the merits, then it must follow that efforts in the State Courts have been exhausted and recourse to this Court is not only appropriate but imperative.

3. Even though property is in the custody of an appointee of a State Court, a Federal Court may nevertheless adjudicate rights therein.

The problem was considered by this Court in *Markham v. Allen*, 326 U. S. 490, and the following was written at page 494:

> "Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a State court, Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 195, 196, 79 L. ed. 850, 855, 856, 55 S. Ct. 386, and cases cited; United States v. Bank of New York & T. Co. supra (296 U. S. 477, 478, 80 L. ed. 338, 339, 56 S. Ct. 343), and cases cited, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. Commonwealth Trust Co. v. Bradford, supra (297 U. S. 619, 80 L. ed. 924, 56 S. Ct. 600); United States v. Klein, supra (303 U. S. 281, 82 L. ed. 843, 58 S. Ct. 536), and cases cited.
>
> • • • •
>
> There remains the question whether the district court having jurisdiction should, in the exercise of its discretion, have declined to entertain the suit which involves issues of the state law and have remitted the petitioner to his remedy in the state probate proceeding. • • • The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner. Meredith v. Winter Haven, 320 U. S. 228, 88 L. ed. 9, 64 S. Ct. 7. • • •"

4. We construed the previous remission by the Circuit Court to the State Courts as an invitation to return if the State evaded its obligation to consider the Constitutional questions.

5. The People is not an indispensable party. It was joined as an accommodation because we understood that the People wished to be joined. If they decline and remain in we have no objection if they are excluded.

CONCLUSION

We respectfully submit that this is a case eminently proper for review by this Honorable Court. Otherwise, National's resort to the Constitution will have been a barren cry in the wilderness and a fruitless baying at the moon.

Dated: New York City, June 24, 1959.

Respectfully submitted,

ALBERT ADAMS,
Attorney for Petitioner,
10 East 40th Street,
New York 16, N. Y.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 142-273

NATIONAL CANCER HOSPITAL OF AMERICA

Plaintiff

against

BETHUEL M. WEBSTER, as Receiver, and THE PEOPLE OF THE STATE OF NEW YORK

Defendants

MEMORANDUM

(Filed April 1, 1959)

NOONAN, *D. J.*

The defendant Webster has moved this court for an order dismissing the complaint on the grounds that this court lacks jurisdiction over the subject matter and further that this lack of jurisdiction is res judicata.

The history of this much litigated action is set forth in 251 F. 2d 466, where the Court of Appeals for this Circuit affirmed Judge Dawson's dismissal of the first complaint served in this matter.

I believe that Judge Dawson's opinion, 153 Fed. Supp. 744 is determinative of the motion presently before me.

In dismissing the prior complaint Judge Dawson said on page 746:

> "If, as the plaintiff contends, such orders and judgments were improperly granted by the State Court, or resulted in the deprivation of plaintiff's property without due process of law, the remedy of plaintiff was, of course, an appeal in the State court proceeding, and if necessary an application for a writ of certiorari to the Supreme Court of the United States. Plaintiff has apparently not sought to avail itself of these remedies but instead seeks to have this court act as a separate appellate tribunal and review the actions of the courts of the State of New York. * * *"

After Judge Dawson's decision had been affirmed by the Court of Appeals for the Second Circuit, the plaintiff pursued the remedies available to it in the courts of the State of New York. When the plaintiff did not receive a favorable determination in the state court proceedings, it commenced this action and filed a complaint which is before me now.

After carefully studying the allegations of the complaint, it appears clear that the present complaint is substantially the same as the one dismissed by Judge Dawson. In this complaint, however, the plaintiff proceeds on the theory that this court should review the state court proceedings and enter a determination that the plaintiff was deprived of the due process of law.

We follow Judge Dawson's reasoning wherein he stated that the plaintiff's remedy was first to proceed on appeal in the state courts and then, if necessary, make an application for a writ of certiorari to the Supreme Court of the United States.

Feeling as we do that a writ of certiorari was the proper remedy of the plaintiff, and knowing that this court is not to function as an appellate tribunal in which actions tried in the state courts of New York can be reviewed, we hold that this complaint must be dismissed.

So ordered.

Dated, New York, N. Y.
April 1, 1959

G. F. NOONAN
U. S. D. J.

Judgment entered

HERBERT A. CHARLSEN
Clerk
4/1/59

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for respondent The People of the State of New York
80 Centre Street
New York 13, N. Y.

WHITMAN KNAPP
Attorney for respondent Bethuel M. Webster, as Receiver of National Cancer Hospital of America
25 Broad Street
New York 4, N. Y.

307 BAR PRESS INC 54 LAFAYETTE STREET NEW YORK 13 N. Y. - WA 5-3432

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented

The question presented by this petition is whether the United States District Court for the Southern District of New York correctly dismissed petitioner's complaint on the grounds, expressed in District Judge Noonan's opinion, that a District Court "is not to function as an appellate tribunal in which actions tried in the state courts of New York can be reviewed," and further that petitioner's complaint "is substantially the same" as that in a prior ac-

tion it had brought in the District Court, the dismissal of which had been affirmed by the Court of Appeals. (Petition, pp. 2a-3a). On petitioner's present appeal, a motion to dismiss the appeal as frivolous and brought solely for the purpose of delay was granted by the Court of Appeals (Clark and Waterman, C.J.J., Galston, D.J.).

Statement

This action arises out of proceedings in the Supreme Court of the State of New York in which respondent Webster was appointed Receiver of petitioner's New York assets and subsequently directed to distribute *cy pres* a portion of such assets. The appointment of the Receiver, made in July 1953, was affirmed by the state Court of Appeals in May 1956, and the Supreme Court's *cy pres* order, entered in February 1957, was affirmed by the Appellate Division and thereafter became final upon denial of leave to appeal by the Court of Appeals on January 8, 1959. *People* v. *National Cancer Hospital* (1956) 1 N Y 2d 802; (1st Dep't 1958) 6 A D 2d 61, *leave to appeal denied* (1959) 5 N Y 2d 709.

Meanwhile, in June 1957 petitioner brought an action in the District Court against the Receiver. The court dismissed the complaint on the ground that a federal District Court is not a proper forum in which to litigate issues concerning disposition of a *res* held in custody of a state court in a pending proceeding. *National Cancer Hospital* v. *Webster* (S. D. N. Y. 1957) 153 F. Supp. 744, *affirmed* (2d Cir. 1958) 251 F. 2d 466. In sustaining that dismissal, the Second Circuit (per Learned Hand, C.J.) plainly pointed out—as had Judge Dawson in the District Court (see 153 F. Supp. at 746)—the fallacy in petitioner's attempt to invoke federal jurisdiction at the District Court

level. Thus, the Court of Appeals stated (251 F. 2d at 468) that the complaint

> "alleged no more than that all further decisions or orders of the state court would be unlawful because the property of the plaintiff was immune from distribution to anyone but itself, and in addition that the order of distribution cy pres, already made, was erroneous. These issues of law are open for decision in the state action, and the complaint at bar is no more than an effort to use the District Court to review decisions already made by the state court, or to substitute that court for the state court in the decision of such issues as it had not decided."

Again, in the opinion upon which the present complaint was dismissed, Judge Noonan indicated that petitioner was in the wrong court, and that review of the state proceedings by certiorari was the appropriate remedy. Thus, his opinion concluded (Petition, p. 2a):

> "We follow Judge Dawson's reasoning wherein he stated that the plaintiff's remedy was first to proceed on appeal in the state courts and then, if necessary, make an application for a writ of certiorari to the Supreme Court of the United States."

Judge Noonan's decision was entered April 1, 1959. Petitioner's time in which to file a petition for certiorari to review the *cy pres* order of the state Supreme Court did not expire until April 8. No petition was filed. Instead, on April 22 petitioner filed a notice of an appeal from the judgment dismissing its federal complaint. The Receiver moved to dismiss the appeal as frivolous and brought solely for the purpose of delay, and the Circuit Court granted the motion, without opinion, on May 7.

Argument

None of the matters discussed in the petition for certiorari could be considered by the District Court in this action. Petitioner's objections to the course of the state-court proceedings are not reviewable in a federal District Court, and the Court of Appeals had made a binding determination to that effect in the previous action brought by petitioner against the Receiver. *National Cancer Hospital v. Webster*, *supra*, 251 F. 2d 466. The petition contains no issue appropriate for review by this Court.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for respondent The People of the State of New York

WHITMAN KNAPP
Attorney for respondent Bethuel M. Webster, as Receiver of National Cancer Hospital of America

July 15, 1959.

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Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for respondent The People of the State of New York

Whitman Knapp
Attorney for respondent Bethuel M. Webster, as Receiver of National Cancer Hospital of America

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